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Nos. 89-1452, 89-1453

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

MOBIL OIL EXPLORATION & PRODUCING SOUTHEAST, INC., *et al.*,
Petitioners,

v.

UNITED DISTRIBUTION COMPANIES, *et al.*,
Respondents.

FEDERAL ENERGY REGULATORY COMMISSION,
Petitioners,

v.

UNITED DISTRIBUTION COMPANIES, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF OF PETITIONERS IN NO. 89-1452

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REPLY BRIEF OF PETITIONERS IN NO. 89-1452

Aside from a few, almost perfunctory, legal points, respondents' submission is merely an extended policy argument for overturning Order 451—an argument that would be better addressed to Congress or the Federal Energy Regulatory Commission ("FERC") rather than this Court. Respondents ask this Court to ignore the express language of Sections 104 and 106 of the NGPA (which respondents never even bother to quote or discuss) as well as Section 7(b) of the NGA. They would also have this Court ignore well-settled principles of statutory interpretation embodied in such decisions as *Chevron USA* v. *NRDC*, 467 U.S. 837 (1984). And perhaps most striking, they would have this Court ignore the central and prescient policy judgment on which Order 451 was based: that, regardless of its effect on wholesale prices for *old* gas (which are not paid by residential consumers at all, see p. 4, *infra*), Order 451 would lead, on average, to a reduction in the only prices that ultimately matter—"burnertip" prices actually paid by natural gas users.

What makes respondents' policy arguments particularly unsatisfactory is that they not only are irrelevant to the legal issues before this Court, but they are also patently incorrect. And, to the extent respondents advance arguments that are germane to the three issues presented in this case—pricing, abandonment and take-or-pay—those arguments cast no doubt on the FERC's authority to adopt Order 451.

I. RESPONDENTS' ASSERTIONS ABOUT THE "DEREGULATORY" EFFECTS OF ORDER 451, ITS ADVERSE EFFECTS UPON CONSUMERS, AND THE INTERESTS OF THE PARTIES IN THIS CASE ARE INCORRECT.

Three policy arguments pervade respondents' brief: (1) the Commission, in Order 451, was trying surreptitiously to dismantle what remained of natural gas reg-

ulation after the NGPA; (2) the overall effect of Order 451 was to harm natural gas consumers; and (3) this Court should give weight to respondents' views on these matters because respondents, rather than the FERC, represent the interests of gas consumers generally. Each of these assertions is groundless.

A. Order 451 did not "deregulate" old gas in any sense. Today, the FERC regulations applicable to old gas span some 230 pages of the Code of Federal Regulations, 27 pages *more* than before Order 451 was adopted. Compare 18 C.F.R. Parts 154, 157, 270, 271 (1990), with 18 C.F.R. Parts 154, 157, 270, 271 (1985).

Even more important, all old gas (except that deregulated under the Wellhead Decontrol Act) is still subject to a ceiling price—established in Order 451—that is cost-based and not, as respondents suggest (Resp. Br. 19-20, 29, 41, 48, 49, 55), based upon "market" prices. See Producers Br. 8-10, 21-23.[1] The ceiling price chosen by the Commission was not simply pulled from thin air, as respondents would have this Court believe.

Because it is a ceiling price, moreover, old gas cannot be priced above it, regardless of what happens to the market price. Thus, that ceiling protects consumers by preventing any natural gas producer from substantially increasing its prices if some unexpected event (like war in the Middle East) or market condition (like a substantial decrease in available supplies) causes a significant increase in the spot market price. Moreover, Order 451 leaves intact the Commission's traditional authority to modify the ceiling price structure further if necessary to protect consumers. See Producers Br. 24.

[1] As used by the Commission, "replacement cost" is the cost of finding new gas fields, drilling new wells and producing new gas. See J.A. 75, 237-38. It is *not*, as respondents' arguments assume, the cost of "replacing" one source of supply with another source of supply on the spot market. The cost studies on which the FERC relied in setting the ceiling price in Order 451 were studies of actual costs, not market prices. See J.A. 233-34.

Respondents' assertion (Resp. Br. 25, 58) that gas "released" under Order 451 is not subject to further certificate or abandonment regulation is equally groundless. Even as to that gas, Commission regulations continue to specify the circumstances under which a producer may and may not abandon sales to a customer. See 18 C.F.R. § 157.301. Moreover, although the Commission does not require the filing of abandonment and certificate applications each time a producer agrees to sell its gas to a different customer, anyone aggrieved by such a decision can file a complaint with the Commission. See *infra* note 15.[2] Under Section 7(b) of the NGA, the Commission retains full authority (a) to invalidate any particular abandonment found to be unlawful, and (b) to change its abandonment and certificate requirements if it believes such a change would be in the public interest.

Respondents' new argument (Resp. Br. 23, 54) that Order 451 violates the filed rate doctrine by relieving sellers of released gas of their usual tariff filing obligations is similarly meritless. Section 157.301(c) of the Commission's regulations requires those sellers to comply with the NGA's tariff-filing requirements in the same way that sellers in other regulated industries are required to comply with similar statutory requirements—by filing summaries of their contracts. See, *e.g.*, *Sea-Land Serv. Co.* v. *ICC*, 738 F.2d 1311, 1316-19 (D.C. Cir. 1984) (holding that this practice satisfies tariff-filing requirement).[3]

[2] This "blanket" certificate and abandonment procedure no more constitutes "deregulation" than similar procedures adopted by the Commission—and uniformly approved by the courts—in other contexts. Such procedures have often permitted pipelines (including the pipelines that are respondents in this case), as well as producers, to abandon service to one customer and institute service to another without obtaining specific Commission approval. *E.g.*, *Kansas Power & Light Co.* v. *FERC*, 851 F.2d 1479, 1482-86 (D.C. Cir. 1988); *Williams Natural Gas Co.*, 51 F.E.R.C. ¶ 62,234 (1990); *Columbia Gas Transmission Corp.*, 33 F.E.R.C. ¶ 61,407 (1986).

[3] For this reason, respondents' claim that the tariff-filing features of Order 451 are contrary to Section 4(b) of the NGA—a claim

In any case, respondents' obsession with "deregulation" does not advance the analysis. "Deregulation" is a label, not a rule of decision. Regardless of how one characterizes Order 451, the only relevant question is whether each of its elements is within the Commission's authority under the NGA and the NGPA. To attempt to resolve this case under respondents' standardless "deregulation" theory would be to undertake the kind of policy determination to which Congress and the FERC are best suited.

B. Respondents' assertion that Order 451 has harmed consumers is also patently false. Respondents do not and cannot dispute that average residential retail prices for natural gas have declined in real terms by approximately 15 percent in the three years since Order 451 went into effect. See Producers Br. 8 n. 3; see also Appendix A, *infra*. Rather, respondents repeatedly suggest (Resp. Br. 2, 20-21, 36-37, 42) that consumers have somehow been made worse off by Order 451 because prices for *old* gas alone have allegedly increased since Order 451.

Residential customers, however, do not buy "old" gas per se. Under the "rolled-in" system of natural gas pricing, consumers buy whatever mix of old and new gas has been purchased at wholesale by a particular pipeline and resold to the customer's "local distribution company." See, *e.g.*, *Laclede Gas Co.* v. *FERC*, 722 F.2d 272, 274 (5th Cir. 1984) (describing rolled-in pricing). From a customer's perspective, the only relevant price is the retail price it pays for that mix of gas. On average, that price has declined substantially since Order 451 went into effect, just as the FERC predicted it would. Respondents' statistics (Resp. Br. 2 & App. B & C) are therefore as irrelevant as they are misleading.

C. To be sure, *some* groups of consumers—including most of the consumer groups represented before this

respondents never raised before the FERC or the court below—is groundless. Cf. *Maislin Indus., U.S.* v. *Primary Steel, Inc.*, 110 S. Ct. 2759 (1990).

Court (see Resp. Br. 71-72)—were made worse off by Order 451, just as the FERC predicted. See J.A. 277, 285, 305. But those were the very customers that the FERC (as well as the Secretary of Energy) found had historically benefitted, at the expense of the American public generally, from the "gargantuan inequity" and geographic disparities inherent in the preexisting old gas pricing regime. J.A. 77 n. 155, 247.

Respondents' suggestions (Resp. Br. 21, 36-37) that they, rather than the FERC, represent the interests of the gas-consuming public generally are therefore preposterous. The FERC is the only party before this Court with the statutory duty and expertise, based on more than 50 years' experience in the industry, to represent the interests of *all* gas consumers.[4] To the extent there is any relevant dispute about the actual effects of Order 451 on consumers, the FERC's judgment—which is amply supported by the only relevant data (see *supra* p. 4)—must control.

II. THE PRICING ASPECTS OF ORDER 451 ARE WELL WITHIN THE FERC'S AUTHORITY.

According to respondents, the root error of Order 451 is that it "collaps[ed] the vintage prices of all categories

[4] Contrary to respondents' efforts to impugn the private petitioners' motives (Resp. Br. 13, 37), natural gas producers have three interests in this case, all of which happen to coincide with the interests of the gas consuming public. *First*, as the Commission predicted, Order 451 has substantially increased the supplies of old gas available to the market. Although this increase in supply has decreased average wellhead prices (see Producer Br. 8 n. 3; Appendix B, *infra*), it has also meant increased sales as well as a longer useful life for existing wells. *Second*, Order 451 has advanced producers' long-term interest in ensuring that natural gas is an attractive and reliable alternative to other energy sources such as coal and electricity. It has done so, for example, by increasing the mobility of natural gas supplies and by fostering producer-pipeline settlements, as well as by reducing prices. *Third*, natural gas producers have a strong interest in avoiding the uncertainty and litigation that likely would accompany the vacatur of Order 451. See Petition for Certiorari in No. 89-1452 at 26-28; Reply Brief in Support of Petition for Certiorari in No. 89-1452 at 1-2.

of old gas into a single price equal to the highest vintage price." Resp. Br. 29. This assertion presents two distinct issues, which respondents sometimes confuse: (1) whether the Commission has the authority to set a single ceiling price for all categories of old gas, thereby collapsing vintage pricing of old gas; and (2) whether the ceiling price the Commission chose satisfies the "just and reasonable" standard of the NGA and the NGPA. The FERC's resolution of both issues is well within its authority.

A. Authority To Set A Single Ceiling Price

Respondents do not dispute that the plain language of Sections 104(b)(2) and 106(c) of the NGPA permits the Commission to set the ceiling price applicable to each vintage of old gas at the same level, and thereby effectively to collapse the vintage pricing system. See FERC Br. 24-30, Producers Br. 18-23. Instead, respondents contend that this language simply cannot mean what it says. They advance three reasons, each of which misses the mark.

First, respondents claim that "the structure and purpose of the statute as a whole" (Resp. Br. 29)—as well as the NGPA's legislative history—override the plain language of Sections 104(b)(2) and 106(c) by demonstrating a congressional intent to preserve the vintage pricing structure for old gas while deregulating new gas. Resp. Br. 33-37, 41-43. But that argument confuses two distinct questions as well as the distinct statutory provisions that address them: (a) what kind of pricing scheme for old gas did Congress itself incorporate, as a starting point, into the NGPA; and (b) to what extent did Congress authorize the FERC to alter that pricing scheme in response to changing conditions?

The answer to the first question is that Congress, without any critical review of the FERC's existing vintage pricing system, simply carried that system forward in the NGPA. That answer is not disputed. It is clearly spelled out in Subsections 104(b)(1) and 106(a) & (b) (not Subsections 104(b)(2) and 106(c), the provisions on which the FERC relied here). It is also confirmed by the structural and historical evidence cited by respondents.

But the answer to the second question cannot be found in Subsections 104(b)(1) and 106(a) & (b), or in respondents' structural and historical materials, which merely describe what Congress was doing in *those* provisions. None of those sources purports to address the scope of the Commission's authority to modify the pricing structure carried forward in the NGPA. Instead, *that* question is squarely answered by the parallel provisions of Sections 104 and 106—*i.e.*, Subsections 104(b)(2) and 106(c)—which respondents neither quote nor analyze.

As explained in petitioners' opening briefs (FERC Br. 30, Producers Br. 18-19), the latter provisions expressly grant the FERC complete authority, "by rule or order" to increase the ceiling price applicable to "any . . . category" of old gas as long as the new price satisfies the "just and reasonable" standard of the NGA. If the Commission (as it is permitted to do) exercises this authority with respect to several categories of old gas simultaneously, and if the Commission (as it is also permitted to do) raises the ceiling price for all categories so affected to the same level, the natural consequence is to eliminate or "collapse" the pricing distinctions among the categories of old gas so affected. See Producers Br. 18-20. Moreover, because all of the vintage categories of old gas were originally created by the Commission itself under the broad "just and reasonable" standard, it stands to reason that, by putting the same standard in Sections 104(b)(2) and 106(c), Congress meant to permit the Commission to collapse some or all of those price categories if it determined that the distinctions among them no longer produced just and reasonable results. See Producers Br. 20-23. In short, the statutory language gives the Commission ample authority to collapse the "vintaged" price distinctions among the various cate-

gories of old gas. See FERC Br. 30 & n. 12, Producers Br. 18-20.[5]

The breadth of Sections 104(b)(2) and 106(c) is also confirmed by the structural and historical evidence cited by petitioners (see FERC Br. 36-38, Producers Br. 27-32), most of which is not even addressed in respondents' brief. One such piece of evidence is the fact that Congress enacted a separate provision—Section 502(c)—to deal with the very problem of "special relief" which respondents now claim (Resp. Br. 38-41) was the sole focus of Sections 104(b)(2) and 106(c). Respondents, therefore, devote a great deal of effort to developing an interpretation of those provisions that would render them superfluous. See Producers Br. 18 n. 5.

In sum, only the Commission's interpretation of its ratemaking authority is consistent with all of the pertinent interpretive materials and therefore best reflects the structure and purpose of the "statute as a whole." Respondents' interpretation, by contrast, would require this Court to ignore a great deal of structural and historical evidence as well as the plain statutory language. Taken together, that evidence demonstrates that the true "compromise" embodied in the NGPA was not, as respondents would have it (Resp. Br. 29, 34-35, 36, 42, 44-45), to deregulate new gas while etching in stone the Commission's existing vintage pricing structure for old gas.[6] Rather, the compromise was to deregulate new gas and retain the pre-existing vintage pricing structure for old

[5] As petitioners pointed out in their opening briefs (FERC Br. 12, Producers Br. 8), Order 451 did *not* collapse the only vintaging relationships mandated by the NGPA itself, *i.e.*, the price distinctions *between* old gas and the various categories of new gas.

[6] Indeed, the implausibility of respondents' position is demonstrated by the patchwork quality of the vintage pricing system as it existed in 1978. Six of the 16 pre-Order 451 categories were based primarily upon the size of the producer. Four others were based solely upon the location of the well. See 18 C.F.R. § 271.101 (1985). Congress simply could not have intended to preserve such arbitrary distinctions forever.

gas *until* the FERC determined that a modification of that structure was just and reasonable. See FERC Br. 37-38.

Second, implicitly conceding that nothing in the language, structure or legislative history of the NGPA specifically *precludes* the FERC from modifying substantially the basic pricing structure embodied as a starting point in Sections 104(b)(1) and 106(a) & (b), respondents make a lame attempt to turn that fact to their advantage. Noting that Sections 104(b)(2) and 106(c) were "added with no debate at the very end of the legislative process" (Resp. Br. 33), respondents contend it is "inconceivable" that Congress would grant the Commission such authority "without providing some description and explanation of what it was doing." Resp. Br. 56. But this argument overlooks the crucial fact that the *entire* compromise embodied in the NGPA was drafted in conference, at the end of the legislative process, and with little debate. See Note, *Legislative History of the Natural Gas Policy Act*, 59 Tex. L. Rev. 101, 114-116 (1980). It also ignores the fact that, aside from forbidding the FERC to reduce any ceiling price, Sections 104(b)(2) and 106(c) simply retained the very "just and reasonable" ratemaking standard under which FERC and its predecessor, during the preceding 30 years, had created, modified, adjusted and, occasionally, abrogated the vintage pricing system. See FERC Br. 30-31, Producers Br. 20. There is therefore no reason why those provisions should have been controversial.

Moreover, respondents' implicit concession that Congress did not speak directly to the precise question of FERC's authority to collapse vintage pricing under the NGPA is dispositive. Congressional silence necessarily means that, even if the FERC's interpretation were not compelled by the plain statutory language (see *supra* pp. 7-8), that interpretation is entitled to judicial deference as long as it is reasonable. See *Chevron*, 467 U.S. at 843 (deference rule applies if Congress has not "directly addressed the precise question at issue"). The Commission's interpretation of the NGPA plainly satisfies that standard for the reasons discussed above (*supra* pp. 6-9) and in

petitioners' opening briefs (FERC Br. 24-30, Producers Br. 18-23, 27-32).

Third, respondents argue that the plain statutory language should be ignored—and FERC's interpretation accorded no deference—because the FERC, according to respondents, has previously interpreted Sections 104(b)(2) and 106(c) as limited to "special relief." Resp. Br. 38-41, 45 n. 19. This argument is frivolous. Despite its lengthy and repetitious discussions of several FERC decisions (Resp. Br. 8-18, 38-41), respondents' brief fails to identify a single decision that even suggests, let alone states, that the FERC's authority under Sections 104(b)(2) and 106(c) is *limited* to special relief. To be sure, the Commission has interpreted those statutory provisions as a source of *authority* for providing special relief. But respondents themselves acknowledge (at 16-17 n. 7) that the very Order in which the FERC expressly analyzed the special relief issue stated that "the authority under these sections may extend much further." Order No. 107-A, 48 Fed. Reg. 45,097, 45,101 n. 14 (Oct. 3, 1983).

B. The Order 451 Ceiling Price

Having failed to show that the Commission exceeded its authority in setting a single ceiling price for all old gas vintages, respondents are left to contend that the ceiling price the Commission chose does not satisfy the "just and reasonable" standard of the Natural Gas Act. Yet respondents do not dispute that the Commission's cost-based methodology was an appropriate means of setting rates under that standard, and they do not claim that Order 451's ceiling price is unjustified under that methodology. See Resp. Br. 31. Rather, aside from their ubiquitous claim that this ceiling is "essentially" deregulatory (see *supra* pp. 1-2), respondents mount two new challenges, neither of which has merit.

First, respondents contend that Order 451's ceiling price is necessarily contrary to the just and reasonable standard because the FERC did not permit producers to charge

that price in all circumstances. Resp. Br. 22, 49-50. Putting aside the fact that respondents were the direct beneficiaries of this feature of Order 451, respondents' argument rests on a mischaracterization of the Commission's order. The Commission did not, as respondents suggest (Resp. Br. 48-52), hold as a general matter that collection of the new ceiling price would be unjust and unreasonable. Rather, it concluded that it would be unreasonable for producers to be able to collect that price automatically, without new negotiations. J.A. 141, 310-11. In so doing, the Commission merely followed its well-established and judicially-approved practice of imposing a reasonable *condition* on the producer's right to collect the ceiling price.[7] Nothing in the NGA or the NGPA precludes the Commission from attaching such conditions to the collection of an otherwise just and reasonable ceiling price.[8]

Moreover, respondents' argument on this point incorrectly assumes that there can be only one "just and reasonable" price. This Court's decisions, by contrast, establish that there is an entire range of acceptable prices, *i.e.*, a "*zone* of reasonableness." *E.g., In re Permian Basin Area Rate Cases*, 390 U.S. 747, 797 (1968) (emphasis added); *FERC* v. *Pennzoil Producing Co.*, 439 U.S. 508, 517 (1979) (same). In Order 451, the Commission determined that this range included, at a mini-

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[7] See, *e.g., Shell Oil Corp.* v. *FPC*, 520 F.2d 1061, 1077 (5th Cir. 1975), *cert. denied*, 427 U.S. 941 (1976) (upholding FPC rule conditioning collection of higher ceiling price on agreement to a "rollover" contract); *Pennzoil* v. *FERC*, 671 F.2d 119, 127-28 (5th Cir. 1982) (upholding FERC rule conditioning collection of higher ceiling price on customer's agreement to pay higher price); *Louisiana Power & Light Co.*, 15 F.E.R.C. ¶ 63,058 (1981) (collection of rates conditioned on continued investigation into price squeeze).

[8] Indeed, Section 101(b)(9) of the NGPA itself imposes a condition on the collection of *any* ceiling price set by the Commission: By specifying that a producer may collect the lower of the contract price or the maximum lawful price, that provision conditions the collection of the maximum lawful price on the existence of contractual authority to collect that price. See 15 U.S.C. § 3311(b)(9).

mum, the existing contract price as well as the new ceiling price. J.A. 94. The fact that the Commission took steps to ensure that the price actually paid would generally be *less* than the Order 451 ceiling (but within the zone of reasonableness) does not render the Order 451 ceiling unjust or unreasonable.

To the contrary, this feature of Order 451 greatly enhanced the consumer benefits of Order 451 because it ensured that the ceiling price would not become, in fact, a price floor. See J.A. 141, 295, 310. It therefore reflects the Commission's careful, balanced approach to resolving the problem of old gas pricing.

Second, respondents argue that Order 451 is unlawful because it provides "incentive" prices for old gas. See, *e.g.*, Resp. Br. 14, 20, 21, 29, 35, 36. This argument is really no more than a play on words. It is an attempt to confuse the ordinary consideration of producer incentives in the ratemaking process with the specialized meaning of the term "incentive price" used in a NGPA provision not applicable to this case.[9] As a term of art, "incentive price" refers to a special ceiling price which the Commission, acting under Section 107(b) of the NGPA, may establish to elicit production of so-called "high-cost" natural gas—for example, gas located at a depth of more than 15,000 feet. See 15 U.S.C. § 3317(c)(5) (listing categories). Such a ceiling price may "exceed[] the *otherwise applicable* maximum lawful price to the extent that such special price is necessary to provide reasonable incentives for the production of such high-cost natural gas." 15 U.S.C. § 3317(b) (emphasis added).

But the mere fact that the NGPA delineates the Commission's authority to establish special "incentive prices" for certain categories of gas in no way precludes the Commission from taking producers' incentives into ac-

[9] Moreover, this argument is relevant, if at all, to the lawfulness of the price at which the Order 451 ceiling was pegged, and not, as respondents suggest (Resp. Br. 34-36), to the validity of the Commission's decision to collapse the vintage pricing structure for old gas.

count when, in the ordinary ratemaking process, it applies the just and reasonable standard to ensure an adequate supply of natural gas. Even in that context, the Commission has always taken incentives into account, explicitly, and with judicial approval. *E.g., Mobil Oil Corp.* v. *FPC*, 417 U.S. 283, 319-20 (1974) (Commission may alter pricing formula to encourage production).

Thus, the fact that Order 451's ceiling price was expressly designed to increase producers' incentives to produce old gas is no basis for invalidating that ceiling. To the contrary, the Commission's finding that these incentives would elicit an additional 11 trillion cubic feet of old gas, thereby increasing overall supply and reducing prices, is one reason why Order 451 should be *upheld* under this Court's "end result" test. See Producers Br. 21 (citing cases).[10]

[10] Respondents' argument (at 43) that the Commission contravened congressional intent by altering producers' *relative* incentives to produce old and new gas is nothing more than a restatement of their erroneous argument that Congress intended to deny the Commission the authority to modify the pricing structure initiated by the NGPA. See *supra* 6-10. *Any* order that affects the price of old gas alone changes the relative attractiveness of old and new gas.

Respondents' suggestion (at 29) that the FERC chose the highest possible ceiling price is also nonsense. The Commission expressly found that a ceiling price higher than the ceiling it selected—based upon a replacement-cost study submitted by producers—would have been amply justified. See J.A. 93, 252, 256. Instead, the Commission chose a lower ceiling price, namely, the ceiling price applicable to the post-1974 old gas vintage. This ceiling price, which was also based upon replacement costs, had previously been approved by the courts. See Producers Br. 24 & n. 10. Moreover, because the Commission wanted to set a single ceiling price in order to eliminate the distortions created by vintage pricing, and because Sections 104(b)(2) and 106(c) prohibit the Commission from reducing ceiling prices, the Commission had to set the new ceiling price at a level at least as high as the highest price applicable to any old gas vintage. Thus, the Commission actually chose the *lowest* ceiling price that would permit it to collapse the vintage pricing structure. See J.A. 43.

In sum, no one disputes that the FERC has authority to increase ceiling prices as long as the resulting ceilings are just and reasonable. Thus, respondents' only real complaint is that the FERC picked the wrong price. But ratemaking is the FERC's responsibility, and respondents have presented no compelling reason why this Court should second-guess the FERC's exercise of that responsibility in this case.

III. RESPONDENTS' CHALLENGE TO ORDER 451's ABANDONMENT PROCEDURE IS MERITLESS.

Section 7(b) of the NGA imposes three requirements, all of them procedural, for a lawful abandonment: (1) approval by the Commission, after (2) "due hearing" and (3) a finding of public convenience and necessity. See Producers Br. 32-33, FERC Br. 39. Respondents do not dispute that Order 451 satisfies the first requirement. Instead, they argue that the hearings the Commission held (which included a detailed examination of the specific circumstances of several pipeline customers, see J.A. 286-93) and the "public convenience and necessity" finding the Commission made in promulgating Order 451 fail to satisfy the second and third requirements. Respondents contend that Section 7(b) requires the Commission to provide "*all* interested parties—not just the immediate parties to the contract" (Resp. Br. 60) with an opportunity for a particularized hearing and a public interest finding made, not on the basis of "market generalities," but on the basis of the "specific circumstances and equities" (Resp. Br. 62) surrounding the abandonment. See Resp. Br. 59-67.[11]

[11] Without even addressing petitioners' analysis of this point (see Producers Br. 42-46), respondents also argue in passing that the GFN procedure created by Order 451 gives producers excessive control of the abandonment decision, and thereby contravenes this Court's decision in *United Gas Pipe Line Co.* v. *McCombs*, 442 U.S. 529 (1979). Respondents' reading of *McCombs*, however, confuses the first requirement of Section 7(b)—actual Commission approval, which was at issue in that case—with the other two requirements, which were not. Respondents' complaints (at 23-25, 31, 62-63) about the "one-sidedness" of the GFN procedure, moreover, call for factual and political judgments that only the FERC—or Congress—is equipped to make.

Respondents do not dispute, however, the Commission's observation that a case-by-case hearing requirement for every abandonment undertaken pursuant to Order 451 would cripple the FERC's regulatory system by creating "lengthy delays before individual abandonments could be granted," thereby "seriously imped[ing] the achievement of this rule's goals of increasing production of old gas and reducing overall prices." J.A. 148; see also Producers Br. 40-42. Nor do respondents dispute that their interpretation of Section 7(b) would effectively nullify the substantive abandonment standard the Commission applied in Order 451, a standard respondents have never challenged and do not purport to contest now. Because the abandonment standard applied in Order 451 turns entirely on generic judgments about the entire industry—*i.e.*, whether abandonment in certain well-defined circumstances serves the "overall needs of the market" (see Producers Br. 32)—that standard is fundamentally incompatible with respondents' plea that the Commission be required to examine the "specific circumstances and equities" of each abandonment.[12]

[12] Contrary to respondents' suggestions (Resp. Br. 66-67), the standard applied in Order 451 is fully consistent with the Commission's decision in *Felmont Oil Corp.*, 33 F.E.R.C. ¶ 61,333 (1985), *rev'd on other grounds sub nom. Consolidated Edison Co.* v. *FERC*, 823 F.2d 630 (D.C. Cir. 1987). As in *Felmont*, the Commission expressly considered the interests of existing customers and determined (a) that those interests were outweighed by the needs of the market as a whole whenever the customer was unwilling to pay the new ceiling price, and (b) that the customers' interest in supply security would be best served by a strong national gas market. J.A. 147, 304-05.

The fact that in Order 451 the Commission made this finding on a generic basis rather than a case-by-case basis is irrelevant. Whereas in *Felmont* the Commission weighed the interests of one purchaser against the overall needs of the market (33 F.E.R.C.

Any reviewing court should be loath to interpret a statutory *procedural* requirement in a manner that intrudes so deeply into the agency's substantive rulemaking authority.[13] This Court need not and should not do so in this case because respondents' interpretation of Section 7(b) is simply incorrect.

First, that interpretation has no support in the language, structure or history of the Natural Gas Act, none of which respondents bother to analyze. Nothing in the language of Section 7(b) suggests that a hearing must be conducted and findings made specifically with reference to a particular abandonment. As petitioners have previously shown (Producers Br. 36-37, FERC Br. 43), the word "hearing" includes generic hearings as well as case-by-case hearings, and it is well settled that public interest findings may be made on a generic basis. See, *e.g.*, *FPC* v. *Moss*, 424 U.S. 494, 500-01 (1976) (rejecting contrary argument); *FCC* v. *WNCN Listeners Guild*, 450 U.S. 582, 594 (1981) (same). That the word "hearing" is modified by "due," moreover, indicates that the FERC is entitled to substantial flexibility in determining what procedure is required in any given circumstance. See Producers Br. 37. In short, respondents provide no reason why this Court should not defer to—and

¶ 61,333 at 61,657), Order 451 (through the GFN procedure) permits the purchaser to make that determination for itself. As petitioners have previously explained (Producers Br. 45), a purchaser can always defeat an abandonment simply by paying the applicable ceiling price—or any lower price it can negotiate with the producer. If the customer's need for the gas is not compelling enough to justify paying a price equal to (or less than) a just and reasonable ceiling price, the customer cannot plausibly claim that its own need for the gas outweighs the needs of the overall market or, indeed, the needs of other customers willing and able to pay a higher price. See J.A. 304-06.

[13] See, *e.g.* 2 Koch, Administrative Law and Practice 139 (1985); *NRDC* v. *NRC*, 685 F.2d 459, 535 (D.C. Cir. 1982) (Wilkey, J., dissenting) (citing *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 549 (1978), and accusing majority of "disguis[ing] a strict substantive review . . . in a fundamentally procedural rubric"), *rev'd*, 462 U.S. 87 (1983).

adopt—the Commission's interpretation of its own organic statute. See FERC Br. 38-39, Producers Br. 37.

Second, none of the decisions on which respondents rely (at 63-64) even suggests that an agency must engage in case-by-case analysis of facts that are irrelevant under the agency's substantive standard—or, equivalently, that an agency must conduct a case-by-case inquiry to determine whether it should make an exception to its generally applicable rules. In *FPC* v. *Texaco Inc.*, 377 U.S. 33 (1964), for example, this Court held that the Federal Power Commission could, consistent with the hearing requirement of Section 7(c) of the NGA, "particulariz[e] statutory standards through the rulemaking process and bar[] *at the threshold*"—*i.e.*, without any adjudicatory hearing—those who did not "measure up" to the agency's standards. *Id.* at 39 (emphasis added); see Producers Br. 38.[14]

[14] Similarly, in *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 205 (1956), this Court held that the FCC, acting without a fact-finding hearing, could summarily deny certain license applications based upon standards adopted in a rulemaking. And in *Heckler* v. *Campbell*, 461 U.S. 458, 465-68 (1983), the Court held that the Secretary of Health and Human Services could properly (a) resolve certain issues bearing on determinations of disability in a rulemaking proceeding, and (b) rely upon the resulting rule rather than litigating those issues anew in each adjudication. The Court reached this conclusion even though, unlike Section 7(b), the express terms of the relevant statute required "individualized determinations based on evidence adduced at a hearing." *Id.* at 467.

Respondent's reliance upon this Court's statement in *McCombs* that Section 7(b) "prohibits abandonment absent specific findings by the Commission" (Resp. Br. 59, quoting 442 U.S. at 536) is frivolous. Inasmuch as this sentence immediately follows the Court's quotation of Section 7(b), it is clear that the "specific findings" to which the Court was alluding were the two findings specified in the statute itself, *i.e.*, "that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment." 442 U.S. at 536 (quoting Section 7(b)). Nothing in Section 7(b) or in *McCombs* remotely suggests that these findings must be "specific" to a particular abandonment.

What those decisions did suggest, in dicta, was that an agency should afford a hearing to resolve any disputes over facts bearing on the *applicability* of the agency's standard, *i.e.*, on whether the requirements of the agency's rule or standard have been met. See, *e.g.*, *Texaco*, 377 U.S. at 40; *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 205 (1956); *Heckler* v. *Campbell*, 461 U.S. 458, 467 n. 11 (1983). But respondents do not dispute that the Commission's complaint procedures (combined with the 30-day advance notice requirement under Order 451) afford them *that* opportunity. See Resp. Br. 63-64.[15]

Third, respondents' argument would require this Court to overrule *FPC* v. *Moss*, 424 U.S. 494, 496 (1976). That decision affirmed the Commission's authority to "pre-grant" abandonment years before the abandonment is to take place. If, as respondents argue (at 60-61), "*all* interested parties" must be given "an opportunity to be heard and to make a full presentation of the facts before any abandonment [can] occur," abandonment could never be pre-granted. The reason is that parties that were not "interested" at the time the authority was granted might well become "interested" at any time prior to the actual abandonment.[16] In short, both the

[15] As petitioners explained in their opening briefs (FERC Br. 44, Producers Br. 41 n. 21), the 30-day notice requirement in the GFN procedure (J.A. 296) is ample time to permit a purchaser to file a complaint requesting that the Commission reject an abandonment before it takes place. Although respondents contend, somewhat coyly, that an "opportunity for specialized treatment" is "wholly absent from the Commission's *automatic abandonment rule contained in Order No. 451*" (Resp. Br. 63 (emphasis added)), they do not dispute that the Commission's administrative complaint procedures provide such an opportunity. See 18 C.F.R. § 385.206. Nor do they dispute that the Commission would in fact consider evidence regarding a producer's compliance *vel non* with the GFN procedure. See Resp. Br. 64.

[16] Moreover, even if respondents' interpretation of Section 7(b) were correct, their argument, as now framed in their brief, is not ripe for review. As discussed above (*supra* note 15), the

statutory language and this Court's decisions squarely support the Commission's interpretation of Section 7(b).

IV. RESPONDENTS AGREE THAT THE FERC'S ANALYSIS OF THE TAKE-OR-PAY ISSUE PROVIDES NO BASIS FOR VACATING ORDER 451.

Respondents do not dispute that an order directly or indirectly requiring the Commission to address further or to resolve the take-or-pay issue would be an unwarranted intrusion into the FERC's regulatory prerogatives. See FERC Br. 47-48, Producers Br. 46-50. Consistent with their brief in opposition to the petitions for certiorari, however, respondents continue to argue that the court of appeals' statements on this question were merely precatory because "the court of appeals did not order the Commission to do *anything* with respect to the take-or-pay issue." Brief for the Respondents in Opposition at 29 (May 14, 1990) (emphasis added); see Resp. Br. 67-70. They thereby concede that this Court need not reach that issue to reverse the decision below *in toto*.[17] Moreover, by

Commission's complaint procedures provide ample opportunity for a purchaser to seek a hearing on a proposed abandonment before it occurs. Respondents' contention that this procedure is inadequate is based solely on their *prediction* that the Commission likely would not consider specific "circumstances and equities" in such a proceeding. See Resp. Br. 64. But this demonstrates precisely why respondents' argument is not yet ripe under well-settled principles: No one can know whether or to what extent the Commission would consider such matters until someone files a complaint challenging an abandonment proposed under Order 451. Petitioners are unaware of any such complaint (see Producers Br. 41 n. 21), and respondents provide no evidence that anyone has ever filed one. Thus, respondents' Section 7(b) claim cannot provide any basis for invalidating Order 451.

[17] Indeed, respondents do not dispute that the fourth issue decided by the court below—the mandatory transportation issue—is now moot, and therefore no longer provides any basis for vacating Order 451. See Producer Br. 49-50 n. 28. Thus, if the Court reverses the court of appeals' holdings with respect to the pricing and abandonment issues, the *only* proper course on remand is to deny respondents' petitions for review altogether.

failing to argue that the court below *should* have made the take-or-pay issue an independent ground for vacating Order 451, respondents implicitly concede that the Commission's analysis of that issue is no basis for vacating that Order now.

* * * *

In sum, respondents' scattershot arguments cast no doubt on the Commission's authority to adopt Order 451. As the Commission predicted, that Order has produced an "end result"—increased gas supplies and lower overall prices—that is unquestionably just and reasonable. And the Commission has ample authority under the NGPA and the NGA to adopt each of the elements of Order 451 challenged by respondents.

CONCLUSION

For these reasons, and for the reasons stated in petitioners' opening briefs, the decision below should be reversed.

Respectfully submitted,

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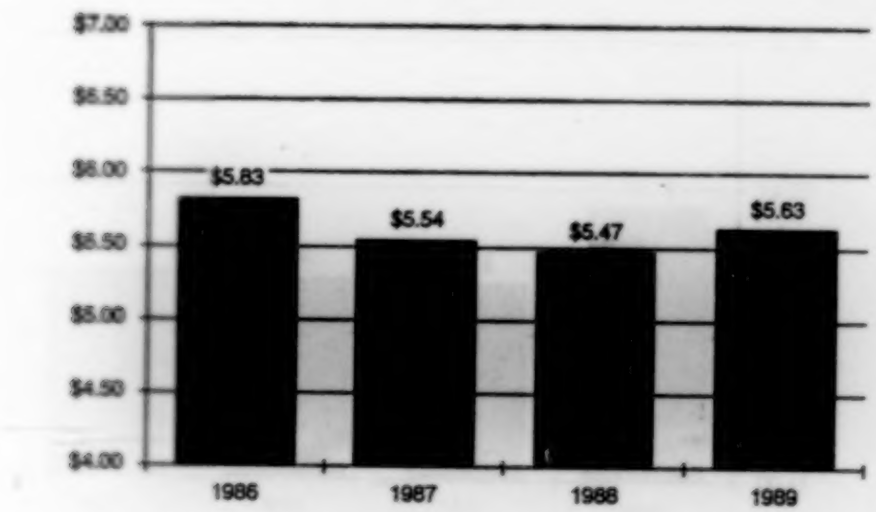
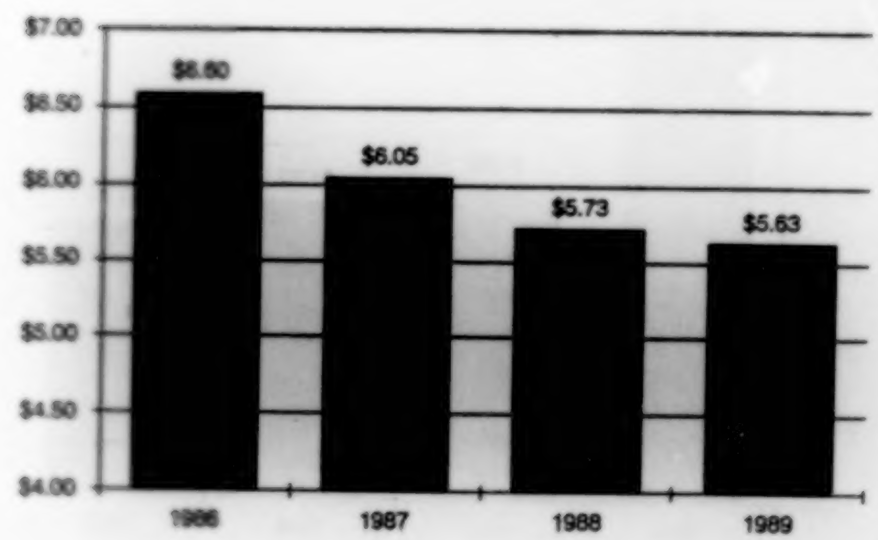
APPENDIX A

U.S. Residential Natural Gas Prices
(actual dollars)



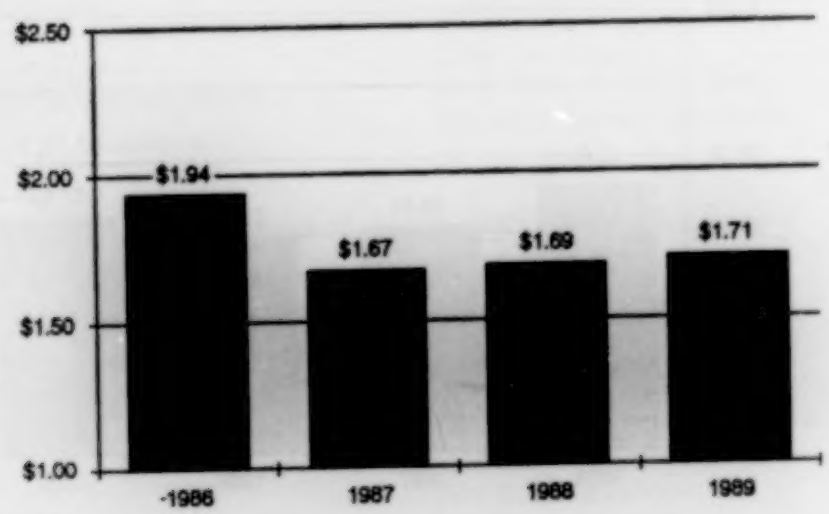
Source: DOE/EIA Monthly Energy Review, March 1990, Table 4

U.S. Residential Natural Gas Prices
(inflation adjusted 1989 dollars)



APPENDIX B

U.S. Wellhead Natural Gas Prices
(actual dollars)



Source: DOE/EIA Monthly Energy Review, March 1990, Table 4

U.S. Wellhead Natural Gas Prices
(inflation adjusted 1989 dollars)